UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

RONALD SAYLES, Plaintiff, vs. ADVANCED RECOVERY SYSTEMS, INC. Defendant.	Case No.: 3:14-cv-911-CWR-FKB PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

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Plaintiff, Ronald Sayles, offers this Memorandum in opposition to Defendant's Motion for Summary Judgment and in support of Plaintiff's Cross-Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit arises out of Defendant's attempt to collect debts allegedly owed by Plaintiff to St. Dominic's Hospital in Jackson, Mississippi. As of March 5, 2014, Defendant had placed five tradelines on Plaintiff's credit report. *See* Pl. Ex. A. Three of Defendant's tradelines were involved in a collection action brought by Defendant against Plaintiff in Hinds County Court in Mississippi and a judgment on those accounts was received. The tradelines that were the subject of the judgment were account numbers: UQTR, PDP2, and PQNX. To clear up any confusion, Plaintiff does not claim that any FDCPA violation occurred with respect to those three tradelines that have been reduced to judgment. Instead, Plaintiff's claim is based upon Defendant's actions with respect to two additional tradelines on Plaintiff's credit report that were not the subject of the judgment: ZYMC and 1218R. A letter dated March 4, 2014 was sent, via facsimile, to (601) 969-2997 advising that Plaintiff disputed the debts and asking for validation of the debt with respect to all the accounts. *See* Def. Ex. A-3. In response to the March 4, 2014 letter, Plaintiff did not receive any documentation from Defendant, which caused Plaintiff to check his credit report once again on April 16, 2014. Upon review of the April 16, 2014 credit report, Plaintiff determined that Defendant had communicated with the credit bureaus by updating information related to the two tradelines that were not reduced to judgment, ZYMC and 1218R, to the credit bureaus once again in April 2014. *See* Pl. Ex. B. However, despite having elected to communicate with the credit bureaus in April 2014 regarding the subject debts, Defendant failed to mark those two tradelines as disputed even though Defendant received Plaintiff's request on March 5, 2014. The Complaint was filed on November 24, 2014 and Defendant filed an answer on January 30, 2015. Defendant filed the instant motion on May 22, 2015.

II. STANDARD OF REVIEW

A motion under Rule 12(c) for judgment on the pleadings is evaluated pursuant to the same standard as a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *Gentilello v. Rege*, 627 F.3d 540, 543-544 (5th Cir. 2010). A Defendant's motion must be denied if the complaint states a valid claim for relief when reviewed in the light most favorable to Plaintiff. *Hughes v. Tobacco Inst. Inc.*, 278 F.3d 417, 420 (5th Cir. 2001). A Plaintiff must plead sufficient facts which are sufficiently plausible to allow the court to reasonably infer that Defendant is liable for the alleged illegal conduct. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

Summary judgment is warranted under Rule 56(c) of the Federal Rules of Civil Procedure when evidence reveals that there is no genuine dispute regarding any material fact such that the moving party is entitled to judgment as a matter of law. Smith v. Citimortgage, Inc., 2009 U.S. Dist. LEXIS 57435, *2-4 (S.D. Miss. July 7, 2009). The party seeking summary judgment must inform the court of the basis for its motion and demonstrate the portions of the record which establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party opposing summary judgment must point to specific evidence in the record as opposed to conclusory allegations and legal arguments to establish a genuine dispute of material fact sufficient to demonstrate an issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002).

III. ANALYSIS

As the parties agree that Plaintiff is a consumer and Defendant is a debt collector and the alleged debts are consumer debts, the only remaining question is whether Defendant has engaged in any act that violates the Fair Debt Collections Practices Act, ("FDCPA"), 15 U.S.C. § 1692 *et. seq*. Defendant makes two arguments in support of its motion for summary judgment and Plaintiff will respond to each accordingly in turn. First, Defendant contends that there can be no 15 U.S.C. § 1692e(8) violation because the letter at issue was not sent within the first thirty days of Defendant's initial dunning letters. Second, Defendant contends that Plaintiff has no Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et. seq.*, claim against Defendant. After responding to Defendant's arguments in turn, Plaintiff will set forth its basis as to why Plaintiff is entitled to summary judgment based upon the undisputed facts of this case.

A. DEFENDANT INCORRECTLY CONFLATES THE REQUIREMENTS OF 15 U.S.C. 1692(g) WITH THE REQUIREMENTS OF 15 U.S.C. § 1692e(8)

Defendant bases its FDCPA argument on the notion that because Plaintiff did not send a written dispute request within the first thirty days, Plaintiff also has no dispute rights under 15 U.S.C. § 1692e(8). Defendant is fundamentally mistaken in its assertion. Defendant cites to numerous cases in support of its 15 U.S.C. § 1692(g) based argument, but even a cursory review of these cases demonstrates their inapplicability to the case at bar because none of those

Plaintiffs were asserting 15 U.S.C. § 1692e(8) claims. *See* D. Br. at 12, n. 17. Since Plaintiff does not contend that Defendant has violated 15 U.S.C. § 1692(g), the cases Defendant cites to are irrelevant. The inquiry under 15 U.S.C. § 1692e(8) is fundamentally different from the inquiry under 15 U.S.C. § 1692(g). As the First Circuit Court of Appeals cogently explained,

> Our conclusion that § 1692g(b) does not define "disputed debt" for the entire FDCPA is further supported by the language of § 1692e(8) itself. If the meaning of "disputed debt" as used in § 1692g(b) carried over to § 1692e(8), then, in order to trigger the limited protection of § 1692e(8), a consumer would be required to submit written notice to a debt collector within the initial thirty-day period. *See* 15 U.S.C. § 1692g(b). But the plain language of § 1692e(8) requires debt collectors to communicate the disputed status of a debt if the debt collector "knows or should know" that the debt is disputed. *See* 15 U.S.C. § 1692e(8). This "knows or should know" standard requires no notification by the consumer, written or oral, and instead, depends solely on the debt collector's knowledge that a debt is disputed, regardless of how or when that knowledge is acquired. Applying the meaning of "disputed debt" as used in § 1692g(b) to § 1692e(8) would thus render the provision's "knows or should know" language impermissibly superfluous.

Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998). Therefore, the proper question in this case is whether Defendant had any knowledge that Plaintiff was disputing the debt. The answer to that question is clearly yes as Defendant does not deny receipt of the March 4, 2014 letter which stated that Plaintiff was disputing his debts with Defendant. *See* D. Br. at 3. Therefore, Defendant had a duty to communicate that the debts were being disputed when making communications regarding Plaintiff's debt. Defendant made communications regarding Plaintiff's debt when it reported its tradelines on Plaintiff's credit report in April 2014. *See* Pl. Ex. B. As a result, Defendant was required to place the dispute delineation on the two tradelines which were not the subject of the state court judgment.

B. PLAINTIFF ALLEGES NO CLAIM UNDER THE FAIR CREDIT REPORTING ACT AGAINST DEFENDANT

While acknowledging Plaintiff does not allege an FCRA violation, Defendant nonetheless spends several pages in its brief explaining why Plaintiff has no claim against Defendant under the Fair Credit Reporting Act. Plaintiff's Complaint contains no FCRA claim as Plaintiff agrees with Defendant that under the governing case law, a consumer only has a private right of action for disputes under the FCRA after sending notification to the credit bureaus. Since Plaintiff never sent a dispute letter to the credit bureaus, Plaintiff does not allege an FCRA claim in his complaint. Defendant never contends in its brief that in the absence on an FCRA claim, there cannot be an FDCPA violation nor could it. Furthermore, to the extent Defendant is attempting to argue that the requirements of lodging a dispute are the same as under the FDCPA, Defendant is simply mistaken.

Under the FDCPA, a consumer can simply state they want to dispute a debt, there is no requirement to have documentation in support of the dispute or a specific rationale in support of the dispute. See *DeSantis v. Computer Credit Inc.*, 269 F.3d 159, 162 (2d Cir. 2001) (stating that a consumer's right to dispute the debt is not dependent on having a valid reason not to pay); *see also McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 507 (7th Cir. Ill. 2008) (Rovner, J., concurring in part and dissenting in part) ("To so dispute a debt, one only need write a letter to Cadleway at the indicated address and state simply, 'I dispute the debt.' These four words alone activate all of Cadleway's obligations under the FDCPA."); *Hudspeth v. Capital Servs. Mgmt. LP*, 2013 U.S. Dist. Lexis 25260 (D. Colo. Feb 25, 2013) ("The debt collector's statement that Plaintiff needed a reason to dispute her debt was false.").

Plaintiff in this case did have a reason to dispute the debt. All of Defendant's tradelines on Plaintiff's credit report state that the original creditor is "medical payment data." Therefore, Plaintiff was not aware of the specific origin of the debts Defendant was reporting and wanted to obtain more information on the accounts and wanted to separate the accounts that were subject to the judgment from the other accounts Defendant was placing on Plaintiff's credit report. This is a legitimate reason to send a validation of debt letter and request that the accounts be marked disputed.

As a result, Defendant's attacks on the failure of Plaintiff to include "all supporting documentation or other information reasonably required to substantiate the basis of the dispute" are misplaced. While Defendant may wish that the FDCPA contained the same requirements as the FCRA with respect to providing supporting evidence for a dispute, the requirements set forth in the FDCPA and FCRA are not the same as shown above. The same argument follows with respect to Defendant's discussion of cases based around the Truth in Lending Act, 15 U.S.C. § 1601 *et. seq.* and the Fair Credit Billing Act, 15 U.S.C. §1666 *et seq*. Since Plaintiff's dispute met the required standard for disputing a debt under the FDCPA, Defendant was required to respond accordingly and act in compliance with 15 U.S.C. § 1692e(8) and mark Plaintiff's two tradelines as disputed when Defendant elected to communicate regarding Plaintiff's tradelines with the credit bureaus in April 2014.

C. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT BASED ON DEFENDANT'S VIOLATION OF 15 U.S.C. 1692e(8)

Defendant does not dispute having received Plaintiff's March 4, 2014 letter. The April 16, 2014 credit report demonstrates the communication between Defendant and the credit bureaus regarding Plaintiff's tradelines in April 2014 and the failure to mark the relevant tradelines as disputed during the course of the communication. Therefore, as demonstrated below, Plaintiff has established that Defendant has violated 15 U.S.C. § 1692e(8) and is entitled to summary judgment on that issue.

The courts have interpreted 15 U.S.C. 1692e(8) as follows. In *Wilhelm v. Credico Inc.*, the Court was faced with the question of whether the Defendant had an "affirmative obligation to communicate that the debt was disputed after the reporting had already been effectuated." 519 F.3d 416 (8th Cir. 2008). The Plaintiff in *Wilhelm* argued that there was an affirmative obligation under 15 U.S.C. §1692(e)(8) requiring debt collectors to correct an already existing trade line with a dispute delineation on a consumer's credit report. *Id*. The *Wilhelm* Court rejected the argument relying in part on *FTC Staff Commentary* stating:

> the relevance of the portion of § 1692e(8) on which Wilhelm relies -- "including the failure to communicate that a disputed debt is disputed" -- is rooted in the basic fraud law principle that, if a debt collector elects to communicate "credit information" about a consumer, it must not omit a piece of information that is always material, namely, that the consumer has disputed a particular debt. This interpretation is confirmed by the relevant part of the Federal Trade Commission's December 1988 Staff Commentary on the Fair Debt Collection Practices Act:
>
> 1. Disputed debt. If a debt collector knows that a debt is disputed by the consumer . . . and reports it to a credit bureau, he must report it as disputed.
>
> 2. Post-report dispute. When a debt collector learns of a dispute after reporting the debt to a credit bureau, the dispute need not also be reported.
>
> Having rejected Wilhelm's affirmative duty contention, we have no difficulty concluding that the district court properly granted summary judgment dismissing these claims.

Id. at 418. (*citing FTC Staff Commentary*, 53 Fed. Reg. 50097-02, 50106 (Dec. 13, 1988)(emphasis added), followed in *Black v. Asset Acceptance, LLC*, 2005 U.S. Dist. LEXIS 43264 at *12-13 (N.D. Ga. 2005), and in *Hilburn v. Encore Receivable Mgmt., Inc.*, 2007 U.S. Dist. LEXIS 29833, 2007 WL 1200949 at *4 (D. Or. 2007)).

In the case at bar however, unlike *Wilhelm* where Credico inc. did not furnish any additional information to the credit bureaus, Defendant went back into Plaintiff's credit report in April 2014 and furnished new information. The *Wilhelm* Court stated in no uncertain terms that "if a debt collector elects to communicate 'credit information' about a consumer, it must not omit a piece of information that is always material, namely, that the consumer has disputed a particular debt." *Id*. *Wilhelm* and the case at bar are thus distinguishable in fact, yet the dictates of *Wilhelm* should still be applied.

Turning to the statutory language, the FDCPA requires the communication of credit information which is known or should be known to be false including the failure to communicate that a disputed debt is disputed pursuant to 15 U.S.C. § 1692e(8). As the First Circuit Court of Appeals explained in *Brady*, the debt collector must communicate that a debt is disputed when it knows or should know the debt is being disputed regardless of how that information is acquired. *Brady v. Credit Recovery Co.*, 160 F.3d 64, 67 (1st Cir. 1998). Defendant acknowledges receipt of the March 4, 2014 letter from Plaintiff stating the debts were being disputed. *See* Def. Ex. A-3. At this point, Defendant acquired knowledge that the debts were being disputed and the obligation to communicate that dispute was triggered. However, Advanced Recovery Systems elected to furnish information on Plaintiff's credit report in April 2014, and failed to include the fact that the debt was disputed, which is a violation of 15 U.S.C. § 1692e(8).

The *Wilhelm* opinion should not be read to mean that the only time a debt collector need furnish information regarding a dispute is in the original reporting. If that were the case, it would render 15 U.S.C. §1692(e)(8) impotent, for it would be nothing more than a race to report. In theory, a collector could, upon placement of the account from the current creditor, report the debt prior to sending a dunning letter from a consumer and then be free from ever having to mark the tradeline as disputed, regardless of how many times the collector goes back into the report to furnish updated information on the account or how many times a consumer subsequently attempts to dispute the debt.

By contrast, adopting the elects to communicate "credit information" about a consumer standard set forth in *Wilhelm* gives meaning to 15 U.S.C. § 1692e(8) by simply requiring a debt collector that becomes aware of the consumer's dispute and makes changes to a consumer's tradeline to include the material information that the debt is disputed as part of the update. This is what Defendant failed to do here and amounts to a violation of 15 U.S.C. § 1692e(8) as set forth in the complaint.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendant's motion to dismiss or in the alternative for summary judgment be denied and Plaintiff's cross motion for summary judgment be granted.

Dated: June 5, 2015

Respectfully Submitted,

/s/ John N. Rocray

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